No. 10472

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible] Donald and Patricia D. McCall,

Appellants,

vs.

United States of America,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS

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FILED

[illegible], 1947

[illegible]

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IN THE

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FOR THE NINTH CIRCUIT

ALAN D. MACLEAN and FRANCIS D. MACLEAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

Opinion Below.

The District Court rendered no Opinion.

Jurisdiction.

The District Court had jurisdiction of this matter under 28 U. S. C. A., §1346(a)(1). This Court has jurisdiction under 28 U. S. C. A., §1291.

Statutes Involved.

The pertinent statutes and regulations are set out in Appendix "A" to this brief.

Statement of Facts.

All of the material facts of the case were stipulated at the trial before the District Court. The facts are summarized as follows:

Elizabeth Beatrice Maclean, a resident of Pasadena, California died February 20, 1954 [T R 14]. Appellants herein are citizens of the United States and Executors of the Last Will and Testament of the decedent [T R 14].

On May 19, 1955, the Executors filed a Federal estate tax return for said estate showing no estate tax to be due [T R 14, Par. IV Stip.]. The Director of Internal Revenue assessed an additional estate tax of $69,045.27 on June 8, 1957. The additional tax with interest in the amount of $8,630.66, (a total of $77,675.93) was paid by the Executors on August 15, 1957 [T R 15, Par. VII Stip.]. A Claim for Refund of the amount of Federal state tax and interest paid was filed with the Commissioner of Internal Revenue by the Executors on September 3, 1957, [T R 15, Stip. VIII]. The Claim for Refund set out the following ground for the allowance thereof:

> "The ground for assertion of the deficiency was that the corpus of an inter-vivos trust should be included in gross estate pursuant to the provisions of Section 811(c)(1)(b) of the Internal Revenue Code of 1939 because of the reservation of a life estate by decedent. The determination of the deficiency is erroneous because decedent's inter-vivos trust was created in 1923. Section 811(c)(1)(b) specifically provides that transfers made before March 4, 1931, are not subject to its provisions." [Par. VII, Ex. A, Complaint; T R 5-8; Par. 7; Answer, T R 12].

The Commissioner of Internal Revenue rejected the Claim for Refund on March 15, 1958 [T R 15-16, Stip. IX]. No part of said Federal estate tax or the interest thereon has been credited, refunded or repaid [T R 16, Stip. X]. This action was commenced by filing a Com-

plaint upon said rejected Claim for Refund on May 28, 1958 [T R 3-11]. The District Court entered judgment for the defendant on March 13, 1959 [T R 32], and a Notice of Appeal from said judgment was filed by the plaintiffs on March 19, 1959 [T R 32].

Assessment of the additional Federal estate tax with which this Appeal is concerned resulted from the inclusion, by the District Director, in decedent's gross estate of the fair market value, as of the date of decedent's death, of the corpus of a trust then in existence [T R 15, Stip. VII]. The genesis of said Trust was:

On January 12, 1923, the decedent executed a Trust Indenture [T R 14, Ex. A, Stip. IV]. By this indenture decedent conveyed the corpus of the trust to John Alexander Maclean, her husband, as trustee [T R 17, 18]. The trust indenture further provided that in case of the death, resignation or failure for any reason of John Alexander Maclean to act as trustee, then the Northern Trust Company, an Illinois corporation, should be Trustee with like powers [T R 18].

On May 27, 1931, John Alexander Maclean, Trustee, did transfer the corpus of the trust created on January 12, 1923, to the Northern Trust Company, Trustee and thereafter ceased to himself act as Trustee [T R 15, Stip. IV, V, Ex. C]. There said corpus rested until Elizabeth Beatrice Maclean died on February 20, 1954 [T R 15, Stip. VI, T R 14, Stip. II]. John Alexander Maclean, husband of the decedent died February 19, 1941 [T R 25, Add. Stip.].

By the Trust Indenture of January 12, 1923, the decedent reserved the entire net income of the trust to herself for life [T R 18]. She also reserved the right to revoke the Trust either in whole or part during the life

of her husband, provided he consented to such revocation, by notice in writing to the trustee. In case of such revocation the trust estate, or the portion thereof to which the revocation applied, was to be reconveyed to Elizabeth Beatrice Maclean by the Trustee, free from all the trusts created by the indenture [T R 19, Ex. A, Stip. IV].

On May 27, 1931, Elizabeth Beatrice Maclean and John Alexander Maclean directed a notice to the Northern Trust Company (The alternative trustee named in the indenture of Jan. 12, 1923). This notice stated that it had been elected to revoke the Trust of January 12, 1923, and John Alexander Maclean, as Trustee thereunder, was directed to transfer all the property held under said trust to a new trust created by Elizabeth Beatrice Maclean with the Northern Trust Company, Trustee, as of the date of the notice of election to revoke [T R 20, Ex. B, Stip. IV]. Note must be made of the fact the corpus of the trust was not reconveyed to Elizabeth Beatrice Maclean as required by the terms of the indenture of January 12, 1923 [Stip. IV, Ex. A, T R 16-19]. Instead the Trustee conveyed the corpus to the alternative trustee under a modified trust agreement [T R 15, Stip. V], and then ceased himself to act as Trustee.

On May 27, 1931, the same day that notice of revocation of the earlier trust was given the Northern Trust Company, Elizabeth Beatrice Maclean made an indenture naming the Northern Trust Company as Trustee of the securities transferred to it by John Alexander Maclean [T R 20, 21 Exs. B and C, Stip. IV]. The modified indenture reserved the income of the trust to Elizabeth Beatrice Maclean for life and thereafter to John Alexander Maclean for the balance of his life [T R 22, 23, Ex. C, Stip. IV].

Elizabeth Beatrice Maclean reserved the right to revoke the Trust as modified on May 27, 1931, but only with her husband's consent. The reservation of the right to revoke was couched in identical language by both the original and modified trust indentures [Exs. A and C, Stip. IV, T R 19, 24]. The Trust as modified on May 27, 1931, was never revoked. It was in force when Elizabeth Beatrice Maclean died on February 20, 1954.

Question Presented.

Did Elizabeth Beatrice Maclean, the decedent, transfer the property giving rise to this action in trust prior to March 3, 1931 within *the meaning and intent of §811 (c) (1) (B) of the Internal Revenue Code of 1939?*

ARGUMENT.

Elizabeth Beatrice Maclean, the decedent, transferred the property giving rise to this action in trust to John Alexander Maclean on January 12, 1923 within the meaning and intent of *§811 (c) (1) (B) of the Internal Revenue Code of 1939, and he, upon his retirement as a trustee, transferred the corpus of the trust to the Northern Trust Company, the alternative trustee.*

The record on appeal is short. The facts are wholly agreed. The question to be answered is simple on its face. That question is: "When did the decedent transfer the property that the Director of Internal Revenue has added to her gross estate?" In spite of the apparent simplicity of the question three possible answers are suggested by the controversy that has arisen between the parties to this action. Those answers are:

(1) January 12, 1923, when the trust was created. Appellants contend this is the correct answer;

(2) February 19, 1941, when the decedent's husband died. Appellee has successfully contended for this date in the Court below;

(3) May 27, 1931. Appellants and Appellee have stipulated as a fact this transfer was made by the trustee rather than the decedent. The Government is in no position to contend on the record that May 27, 1931, is the correct answer to the question posed.

The District Court, without finding as a fact the date on which the questioned transfer was made concluded as a matter of law, [CL VII, T R 30], that the Trust in existence at the date of Elizabeth Beatrice Maclean's death was the result of a transfer in trust made by her after March 4, 1931 within the meaning of §*811 (c) (1) (b) of the Internal Revenue Code of 1939*. It is therefore necessary to assume the District Court held the transfer occurred on February 19, 1941 when John Alexander Maclean died. (Stipulation of Fact No. V, T R 15 eliminates the possibility that the decedent made the transfer on May 27, 1931. John Alexander Maclean made that transfer to the Northern Trust Company, Trustee) *Section 811 (c) (1) of the Internal Revenue Code of 1939* as amended, reads in part:

> "the value of the gross estate of the deceased shall be determined by including the value at the time of his death of all property * * * (c)(1) GENERAL RULE—to the extent of any interest therein of which the *decedent has* * * * at any time *made a transfer* * * * by trust or otherwise in" [Emphasis supplied].

This statute does not say that an interest which the Trustee transferred by his death shall be included in the

gross estate of the creator of the Trust. It is only property of which the decedent, whose estate is being taxed, has made a transfer that §*811 (c) (1)* requires be included in his gross estate. Even this requirement is limited with respect to property transferred prior to March 4, 1931, by the provisions of §*811 (c) (1) (B)* of the Code.

In fairness to the District Court it must here be said its action found some support in the solitary precedent of the case of *Smith, Executor v. United States,* Ct. Cls. 139 Fed. Supp. 305 (1956). The Court of Claims' Opinion was rendered by three Judges and there were two strong dissents from the majority Opinion. Search discloses only the District Court in the present case, to have followed *Smith v. United States* (*supra*).

As a precedent for its decision, the Court of Claims relied upon its earlier decision in the case of *Means v. United States,* 39 F. 2d, 748, 69 Ct. Cls. 539 (1930). The *Means* case is distinguishable on the facts. Gift taxes were the subject matter of the *Means* case and estate taxes of the *Smith* case. More important in the *Means* case, the creator of the Trust alone reserved the power of revocation. In the *Smith* case only the Trustee, who chanced to be also the husband of the grantor, could revoke the trust by giving his consent to her request so to do. Likewise in the case of *Reinecke v. Northern Trust Company,* 49 S. Ct. 123 (1928) affirming and reversing CCA-7, 24 F. 2d, 91 which affirmed DC, D Ill. the grantor of the Trust alone held the power of revocation. It is submitted that the dissenting opinions in the *Smith* case, which are in harmony with the decision of the Tax Court in the case of *Cuddihy v. Commissioner of Internal Revenue,* 32 T. C. 110 (1959) correctly announced that it is unimportant when the power of rev-

ocation or termination was relinquished. The controlling date is when the transfer in trust was made by the decedent. That is, stipulated to have occurred on January 12, 1923. Such transfers of property prior to March 3, 1931 serve to exclude the property transferred from the gross estate of the grantor. *§811 (c) (1) (B), Internal Revenue Code of 1939.*

In the recent case of the *Estate of Robert J. Cuddihy, deceased et al. v. Commissioner of Internal Revenue,* 32 T. C. 110 (September 10, 1959) the Tax Court of the United States expressly declined to follow the Court of Claims' majority opinion in the case of *Smith v. United States,* (*supra*). In that case, as here, a deficiency in Federal Estate taxes was determined by using *§811 (c) (1) (B)* as the statutory vehicle for placing a portion of the corpus of a reciprocal trust created by the decedent on May 20, 1926, in his gross estate at the time of his death on December 22, 1952. The *Cuddihy* trust was made terminable in favor of the decedent's issue by the trustees with the consent of a majority in interest of the income beneficiaries. Decedent's wife and three sons were the trustees. On November 21, 1941, the wife resigned as trustee. She died June 2, 1944. On May 15, 1946, decedent released his right to consent to the termination of the wife's trust. February 7, 1949, decedent waived any possible interest he might have in the corpus of either trust. On April 8, 1948, decedent released his right to receive income from his wife's trust and thereafter received no income from that trust.

The Commissioner of Internal Revenue took the position that one-half of the value of the corpus of the wife's trust was includible in decedent's gross estate under §811 (c)(1)(B) of the Internal Revenue Code of 1939, because

the decedent had retained for his life the possession or enjoyment of, or the right to one-half the income from the trust property.

In its decision in the *Cuddihy* case the Tax Court said:

> "The petitioner contends however (1) that since the Emma F. Cuddihy Trust was created prior to March 4, 1931, it is specifically excluded from the operation of section 811(c)(1)(B) by the last sentence of section 811(c), and (2), in any event, section 811(c)(1)(B) is not applicable because prior to his death the decedent had relinquished all rights in the trust, including any rights to income and possession or enjoyment of the property.

The last sentence of section 811(c) provides that *"Subparagraph (B) shall not apply to a transfer made before March 4, 1931; * * *"* This provision on its face appears clearly to exclude from the operation of section 811(c)(1)(B) a transfer in trust made on May 20, 1926. *The respondent maintains, however, that "a transfer" in trust cannot be "made" before March 4, 1931, where, as here, the trust was terminable with the grantor's consent.* The respondent asserts that "a transfer" within the meaning of the last sentence of section 811(c) did not take place until May 15, 1946, when the decedent by instrument released his right to join in the termination of the trust. The respondent has here advanced an elaborate argument based upon the legislative and judicial history of section 811(c)(1).

Tracing his argument briefly, the respondent first points to the decision of the Supreme Court in May v. Heiner, 281 U. S. 238 [8 AFTR 10904], in which it was held under the Revenue Act of 1918, requiring

the inclusion in a decedent's gross estate of any property transferred during his life-time "intended to take effect in possession or enjoyment at or after his death," that an irrevocable transfer in trust under which the decedent-settlor had retained a life interest was not includible in his estate. In March 1931 Congress passed a joint resolution (46 Stat. 1516) amending the estate tax provisions by prospectively providing that a transfer of property subject to a life interest reserved in the transferor is includible in his gross estate. Transactions involving transfers of property occurring prior to 1931, of course, were governed by the holding of the Supreme Court in May v. Heiner, supra. In 1949, however, the Supreme Court in Commissioner v. Church, 335 U. S. 632 [37 AFTR 480], overruled its previous holding in May v. Heiner, supra, with the result that pre-1931 transactions involving a transfer of property subject to a life interest were made subject to inclusion in the gross estate. *Congress, in the Technical Changes Act of 1949, thereupon added the last sentence of section 811(c) of the 1939 Code, which provided that Section 811(c)(1)(B) should not apply to "a transfer made prior to May 4, 1931."* The congressional purpose underlying the enactment of the exemption contained in the last sentence of section 811(c) was the protection of decedents who had relied upon the decision of the Supreme Court in May v. Heiner, supra, with respect to pre-1931 transactions. S. Rept. No. 831, 81st Cong., 1st Sess., 1949-2 C. B. (Part 2) 289, 293. The respondent accordingly contends that the exemption provided by the last sentence of section 811(c) is inapplicable to any transfer of property other than one which is

identical to that involved in May v. Heiner, supra, and, therefore, a transaction, to be eligible under that exemption, must not be revocable or terminable by the transferor.

In support of his position, the respondent relies upon the decision of the United States Court of Claims in Smith v. United States, 139 F. Supp. 305 [49 AFTR 696]. The transaction there involved was a trust created in 1923 under which the decedent reserved the right to income for life. The decedent's husband, one of two trustees, was given power in his sole discretion to modify or revoke the trust. Further, the settlor, jointly with her husband, could modify, terminate or revoke the trust. The Court of Claims, in a three to two decision, held that the last sentence of section 811(c), exempting "a transfer made prior to March 4, 1931," refers only to an irrevocable transfer in trust, and that since the decedent needed only to obtain the consent of her husband (who had no adverse interest) in order to revoke the trust and recover the property, the transaction was not "a transfer" within the meaning of the exemption provided in section 811(c). In so holding, the majority opinion relied in part upon several gift tax cases which hold that a transfer of property is incomplete for purposes of creating a taxable gift if the transferor retained a power of revocation over the property. Burnet v. Guggenheim, 288 U. S. 280 [11 AFTR 1392]; Sanford's Estate v. Commissioner, 308 U. S. 39 [23 AFTR 756]; Means v. United States, 39 F. 2d 748 [8 AFTR 10603].

In our opinion, the transaction involved in Smith v. United States, supra, is factually distinguishable from the one here presented. The trust created by the

decedent in the Smith case was revocable in favor, of the settlor by her joint action with her husband, whereas the transfer here was completely irrevocable. Only with the consent of at least four of the children of the decedent could a termination of the trust be accomplished, and then only in favor of the decedent's children. The decedent possessed no right or power after the creation of the trust in 1926 by which he might recover the property.

Moreover, the court's reliance in the Smith case upon the gift tax decisions cited above as bearing on the meaning of the word "transfer" as used in section 811(c) is we think inapposite. A transaction held to constitute a transfer for estate tax purposes is not necessary to be regarded as a transfer under the gift tax provisions. Smith v. Shaughnessy, 318 U. S. 176, 130 AFTR 388]. The reason for a variation in treatment of the same transaction under two different provisions of the Internal Revenue Code is that only a completed transfer of the beneficial interest can support the imposition of a gift tax, whereas the estate tax attaches to whatever interest in transferred property is retained by the decedent at the time of his death.

Consequently, we do not consider the decision of the Court of Claims in Smith v. United States, supra, controlling in the resolution of the issue here presented.

The respondent's reliance upon the legislative history of section 811(c)(1) is not persuasive because the wording of the statute, which speaks simply of "a transfer made before March 4, 1931," is plain and unambiguous, Crooks v. Harrelson, 282 U. S. 58 [9 AFTR 571]; Alexander C. Yarnall, 9 T. C. 616,

affd. 170 F. 2d 272 [37 AFTR 355]. Taken in its normal sense, the application of the statutory phrase in question to a transfer in trust appears to refer to the time of the transfer of title to the trustee, rather than to some subsequent time when a retained right or power is released. The exemption section neither mentions nor implies the nonexistence of a right to terminate as requisite to an exempt transfer, and we see no reason to read into it an exception not stated or implied.

We are supported in our view of the meaning to be placed on the words "a transfer made before March 4, 1931," by the fact that it is consistent with the statutory usage of the word "transfer" in section 811. Section 811(d), for example, imposes an estate tax on a "transfer" that is revocable by the decedent. Section 811(c)(1)(B) taxes a "transfer" under which the decedent has retained possession, enjoyment, or the right to income from the transferred property. Section 811(c)(1)(C) taxes a "transfer" intended to take effect in possession or enjoyment at or after his death. *It is, therefore, apparent that the word "transfer," as used in section 811, does not necessarily refer to an absolute or completed transfer of the entire beneficial interest in the conveyed property identical words used in different parts of the same statute must be construed to mean the same thing unless a contrary meaning is clearly shown. United States v. Olympic Radio and Television, 349 U. S. 232 [47 AFTR 662]; Helvering v. Stockolms Enskilda Bank, 293 U. S. 84 [14 AFTR 675].*

For the foregoing reasons, we are of the opinion that *the transfer to which the last sentence of section 811(c) refers is the transfer of legal title to a*

trustee upon the creation of a trust prior to March 3, 1931. A transfer in trust under which a settlor retains a right to join in a termination solely in favor of his children clearly falls within the terms of that exemption. We accordingly hold that the transaction here involved, which occurred on May 20, 1926, is excluded from the operation of section 811 (c)(1)(B)." (Italics ours.)

The Commissioner of Internal Revenue took the position at the trial of the *Cuddihy* case that a "transfer" did not take place within the meaning of the last sentene of §811(c) of the Internal Revenue Code of 1939 until May 15, 1946, when the decedent released his right to join in the termination of the trust. He was not upheld in this position by the Tax Court.

In the case now here on appeal the District Court has upheld the Commissioner's Assertion that a "transfer" within the meaning of the last sentence of *§811(c) of the Internal Revenue Code of 1939* did not take place until February 19, 1941, when the decedent lost all possibility of the revocation or termination of her trust through the death of John Alexander Maclean, her husband. Her trust could only be revoked or terminated during his life and with his consent.

It is submitted that this decedent who lost whatever power she may have had to revoke or terminate a trust to which she had made a transfer of property prior to March 4, 1931, because of her husband's involuntary act of dying, is in at least as favorable a position as the decedent in the *Cuddihy* case (*supra*), who gave up a right of termination voluntarily and by his own Act. The Court excluded the corpus of the *Cuddihy* trust from the gross estate upon the authority of the last sen-

tence of §*811(c)*, for the reason that the transfer to the trust was made on May 20, 1926. The District Court erred in not excluding the corpus of the Maclean trust from the decedent's gross estate for the same reason.

The following pertinent sentence from the Tax Court's opinion is one to which appellants here desire to direct the Court's attention:

"The respondent's reliance upon the legislative history of §*811(c)(1)* is not persuasive because the wording of the statute, which speaks simply of 'a transfer made before March 4, 1931' is plain and unambiguous." Appellants accept this view of the statute and suggest it is in harmony with the underlying legislative history. Appellants contend the same ultimate decision should be reached by a Court that completely disagreed with the Tax Court on its conclusion with respect to the clarity of the language found in §*811(c)(1) of the Internal Revenue Code of 1939*.

Two rules of statutory construction bear examination at this point. These rules are succinctly set out by the Circuit Court of Appeals for the Third Circuit with its opinion rendered in the case of *Lewellyn v. Harbison, et al.*, 31 F. 2d 740, 742, 7 A. F. T. R. 8614, 8616 (1929) reversing D. C. W. D. Pa. 26 F. 2d 126. The pertinent language of the opinion reads:

> "* * * while a statute imposing taxes is construed most strongly against the government (Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211), it is also true that a statute allowing exemptions is construed strictly in favor of the Government (Bank of Commerce v. Tennessee, 161 U. S. 134, 146, 16 S. Ct. 456, 40 L. Ed. 645) * * *".

The Ninth Circuit has applied both rules where the occasion arose. *Weaver v. Commissioner,* 97 F. 2d 31, 34, 21 A. F. T. R. 310, 313 (1938) and *Schwabacker v. Commissioner,* 132 F. 2d 516, 518, 30 A. F. T. R. 634, 636 (1942), *Weible v. United States,* 244 F. 2d 158, 162, 51 A. F. T. R. 259 (1947). *§811(c)(1)(b) of the Internal Revenue Code of 1939* and the *Joint Resolution of Congress of March 3, 1931,* 46 Stat. 1516 both impose Federal estate taxes. Their inherent ambiguities, if any, must be construed in favor of the taxpayer and against the Government.

It follows that if the language of *§811(c)(1)* of the *Internal Revenue Code of 1939* is clear and unambiguous, then the corpus of the Elizabeth Beatrice Maclean trust is to be excluded from her gross estate because she made the transfer to the trust before March 3, 1931, and the statute says in plain words that it does not apply to such transfers. If the language of *§811(c)(1) of the Internal Revenue Code* is cloudy, doubtful, confused, ambiguous or unintelligible, then the corpus of the Elizabeth Beatrice Maclean trust must also be excluded from her gross estate because of the rule of statutory construction that requires such doubts to be resolved against the Government and in favor of the citizen.

Cases supporting this rule of construction are too numerous for citation. Among them are:

> *Gould v. Gould,* 245 U. S. 151, 38 S. Ct. 53, 3 A. F. T. R. 2958 (1917) Affirming S. Ct. N. Y. (168 App. Div. 900, 152 N. Y. Supp. 1114).
>
> "* * * In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations

so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United States v. Wigglesworth,* 2 Story 369, Fed. Cas. No. 16,690; *American Net & Twine Co. v. Worthington,* 141 U. S. 468, 474, 12 S. Ct. 55, 35 L. Ed. 821; *Benziger v. United States,* 192 U. S. 38, 55, 24 Sup. Ct. 189, 48 L. Ed. 332. * * *"

In the case of *United States v. Field,* 255 U. S. 257, 41 S. Ct. 56, 3 A. F. T. R. 3095 (1921), an Appeal from a decision of the Court of Claims, the Supreme Court was called upon to interpret the provisions of §*202(a) & (b)* of the Revenue Act of 1916. The question presented was whether the Act imposed the Federal Estate Tax on a certain interest that passed under testamentary execution of a general power of appointment created prior, but executed subsequent to its passage. In the course of its opinion, which affirmed the decision of the Court of Claims in the taxpayer's favor, the Supreme Court said (41 S. Ct. 257):

"(1) No question being suggested as to the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment created before, but executed after, the passage of the taxing act (see Chanier v. Kelsey, 205 U. S. 466, 473, 478, 479, 27 Sup. Ct. 550, 51 L. Ed. 882; Knowlton v. Moore, 178 U. S. 41, 56-61, 20 Sup. Ct. 747, 44 L. Ed. 969), the case involves merely a question of the construction of the act. Applying the accepted canon that the provisions of such acts are not to be extended by implication (Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211), we are constrained to the

> view notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment."

The provisions of *§202(b) of the Revenue Act of 1916* bear considerable similarity to those of *§811(c) of the Internal Revenue Code of 1939*. It is submitted that the District Court erroneously extended the provisions of *§811(c)(1) of the Internal Revenue Code of 1939* by implication when it entered judgment against the present appellants on March 3, 1959.

The Circuit Court of Appeals, Ninth Circuit, applied the rule of *Gould v. Gould, (supra)*, in the case of *Weaver Co. v. Commissioner of Internal Revenue,* 97 F. 2d 31, 34, 21 A. F. T. R. 310, 313, (1938) wherein a decision of the Board of Tax Appeals was reversed. The problem there presented to the Appellate Court was that of the interpretation of Sections of the Revenue Act of 1932 relating to the taxation of certain corporate liquidating dividends. The Circuit Court said:

> 21 A. F. T. R. 312-313:
>
> "Fourth. The most that can be said for respondent is that it is doubtful whether §§22(d), 115(c) and 112, on the one hand, or §23(r)(1) on the other hand is applicable. The rule announced in Gould v. Gould, 245 U. S. 151, 152, 153, 38 S. Ct. 53, 62 L. Ed. 211, is applicable, we think, and is: 'In case of doubt they (taxing statutes) are construed most strongly against the Government, and in favor of the citizen.' Therefore, §23(r)(1) should be construed as not applicable to petitioner."

It is submitted that this language has direct application to the determination of whether or not Elizabeth Beatrice Maclean made the presently disputed transfer in trust on January 12, 1923, as the Appellants contend, or on February 19, 1941, as the District Court has obviously decided. If the transfer occurred on the earlier date, it is not subject to Federal Estate Tax. If it took place when decedent's husband died on February 19, 1941, the corpus is taxable. In case of doubt taxing statutes are construed most strongly against the government and in favor of the citizen. *Gould v. Gould,* (*supra.*)

The United States District Court for the Southern District of California has not hesitated to apply the rule of the *Gould* case. In *Kern River Oilfields of California, LTD. v. Welch,* D. C. S. D. Calif. 15 A. F. T. R. 941 (1933) Judge Cosgrove said:

15 A. F. T. R. 942:

> "The interpretation sought by the government would change a provision of a statute in which there is no ambiguity whatever. This may not be done. (Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211 (3 Am. Fed. Tax Rep. 2958))."

Judge Cosgrove was affirmed by the Ninth Circuit in the *Kern River Oilfields* case, 78 F. 2d 631, 16 A. F. T. R. 438 (1935).

Judge Yankwich, sitting for the District Court of Nevada, made vigorous application of the rule of the *Gould* case, *supra,* by his opinion in the case of *In re Owl Drug Co.,* 21 Fed. Supp. 907, 912, 20 A. F. T. R. 729, 734 (1937). The question before Judge Yankwich was one of the imposition of an income tax upon certain income of a Trustee in Bankruptcy. The tax claim was

dissallowed. In support of this action Judge Yankwich said:

> 21 Fed. Supp. 912, 20 A. F. T. R. 734:
>
> "This is a specific limitation. We must give effect to it. To read into it the unlimited definition of "income" applying in the case of persons other than the named fiduciaries, is to destroy the limitation. No tax can be imposed by implication, or by judicial construction. We are bidden to interpret tax statutes strictly against the Government, and to resolve in favor of the taxpayer doubts as to the fact of the imposition of a tax, and the amount of it. See Gould v. Gould (1917) 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211; Crooks v. Harrelson (1930) 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156; Cole v. Commissioner (C. C. A. 9, 1935) 81 F. (2d) 485, 487, 104 A. L. R. 420; Commissioner v. Bryn Mawr Trust Co. (C. C. A. 3, 1936) 87 F. (2d) 607, 611. To do away with the limitation would mean going in the face of this salutary policy."

It is submitted that *§811(c)(1)(B) of the Internal Revenue Code of 1939* is a specific limitation. It was necessary for the District Court to destroy this limitation by reading into the plan words "transfer made before March 3, 1931" the word "irrevocable" in order to arrive at the judgment entered on March 3, 1959. Statutes imposing a tax are interpreted strictly against the Government and doubts as to the imposition of a tax are resolved in favor of the taxpayer.

This Court is simply called upon to decide whether Elizabeth Beatrice Maclean transferred the property giving rise to the disputed estate tax on January 12, 1923,

or made that transfer by the medium of her husband's death on February 19, 1941. If she transferred the property by her husband's death on February 19, 1941, the District Court's judgment of March 3, 1959, should be affirmed, but if she transferred the property on January 12, 1923, the District Court's judgment of March 3, 1959 should be reversed and the tax refunded with interest.

In summary it is submitted:

1. The words "a transfer made before March 4, 1931" are so plain and unambiguous as to clearly exclude the corpus transferred to the Elizabeth Beatrice Maclean trust on January 12, 1923, from her gross estate under the provisions of *Section 811(c)(1)(B) of the Internal Revenue Code of 1939.*

2. If there is any doubt as to whether the words "shall not apply to a transfer made before March 4, 1931," used in §811(c)(1) of the Internal Revenue Code of 1939 serve to exclude the corpus transferred to the Elizabeth Beatrice Maclean trust on January 12, 1923 from her gross estate, that doubt must, on the authority of *Gould v. Gould, supra,* be resolved against the Government, and the corpus of the Maclean trust excluded from decedent's gross estate.

Conclusion.

It is respectfully submitted that the District Court's judgment of March 3, 1959, should be reversed with instructions that judgment be entered for the Appellants.

Ernest R. Mortenson,

Attorney for Appellants.

Dated: 9th day of October, 1959.

APPENDIX A.

Statutes Involved.

Section 811(c)(1)(B) Internal Revenue Code of 1939:

"Sec. 811. Gross Estate

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) Transfers in Contemplation of, or Taking Effect at, Death.—

(1) General rule.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of his death; or

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or"

"Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516.)"

Joint Resolution of Congress of March 3, 1931, 46 State. 1516:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:

'(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."